No. 98-678

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

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Los Angeles Police Department,
*Petitioner,*

v.

United Reporting Publishing Corp.,
*Respondent.*

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On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Whether the government violates the First Amendment when it releases records only for limited, noncommercial purposes?

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### JURISDICTION

The Ninth Circuit entered its judgment on June 25, 1998. This Court granted certiorari on January 25, 1999. Petitioner invokes the jurisdiction of this Court under 28 USC 1254(1).[1]

### STATUTORY PROVISION INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The statute relevant to this Petition, Cal. Gov't Code § 6254(f)(3) (Deering 1997) is reprinted in full in the Appendix to this Brief, but is reproduced here in relevant part:

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[1] Pursuant to S. Ct. R. 14(e)(v), Petitioner notes that, because this action calls into question the constitutionality of a state statute, 28 USC 2403(b) may apply. In compliance with S. Ct. R. 29.4(c), Petitioner served the Petition for a Writ of Certiorari upon the State of California. Although the Ninth Circuit did not certify to the State Attorney General the fact that the constitutionality of a state statute was drawn into question (*see* S. Ct. R. 29.4(c)), the State Attorney General (i) was a party to the district court proceedings, (ii) is subject to the injunction entered by the district court, and (iii) declined to appeal the district court's ruling to the Ninth Circuit.

[S]tate and local law enforcement agencies shall make public the following information . . . .

(3) [T]he current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . . , except that the address of the victim of [certain specified crimes] shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

## STATEMENT

1. The California Public Records Act, like the federal Freedom of Information Act and the public records statutes of essentially every state, provides that certain government records will be made public, that other records will be kept confidential, and that still others will be released only on certain conditions. Such statutes seek to strike a balance between the state's competing interests in, among other things, fostering an informed public and maintaining individual privacy. Among the records encompassed by these statutes are crime reports. These government records contain a variety of information that the state compels arrestees, victims, and witnesses to provide, including names, addresses, and details about the crime.

Prior to 1996, California provided for the public release of this crime report information. *See* Cal. Gov. Code § 6254 (pre-amendment). The statute, however, gave rise to substantial invasions of individual privacy as persons and businesses used the address information to solicit arrestees,



crime victims, and their families. In particular, a cottage industry of businesses arose demanding that government agencies produce such information for private gain. These businesses (including Respondent United Reporting Publishing Corp.) exist for the almost singular purpose of collecting names, addresses, and other information for their own commercial benefit. The customers of these businesses – principally other businesses such as law firms, chiropractors, and driving schools – use the information to contact and generally to sell their services to arrestees and crime victims.

In response to these invasions of privacy, various groups including the California Peace Officers' Association ("CPOA") proposed in 1995 that the state public records act be amended in order to prohibit the release of crime victim and arrestee addresses. In its legislative proposal, CPOA noted the dramatic growth in the "number of groups and individuals serving boilerplate requests under the Public Records Act to virtually every law enforcement agency in the state." Ct. App. Supp. Excerpt. Rec. 307. In particular, within the previous year alone, the number of requests seeking "the names and addresses of arrestees, parties to traffic collisions and others who might have come in contact with law enforcement" had "increased by *1200%*." *Id.* (emphasis added). CPOA therefore proposed "simply deleting the two words 'current address'" from the statutory sections providing for the release of crime report information. *Id.*

A variety of groups and individuals offered their strong support for the proposal. For example, the San Diego County Sheriff's Department noted its experience that, "[m]ore often than not, the information sought in these requests has nothing to do with the underlying purpose of providing access to public records." Ct. App. Supp. Excerpt. Rec. 307. Instead, "persons [who] have been arrested become the target of lawyer solicitations; burglary victims become the target of alarm companies; battery victims become the target of chiropractor solicitations; etc." *Id.* The state Attorney

General's Office submitted its view that "[s]uch practices jeopardize the privacy, dignity, and even the security, of these persons." *Id.* 339. And other organizations noted the "countless complaints from crime victims and other injured parties about unsolicited business offers that followed their victimization and suffering." *Id.* 366.

Attorneys also voiced their support for reforming the statute as well. They noted, for example, that "[i]t is not uncommon to have more than a dozen letters received by the same individual, or his mother, father or spouse. Such letters, received by a person other than the arrestee himself, can result in significant embarrassment, loss of employment, even marital divorce." Ct. App. Supp. Excerpt. Rec. 364. Others catalogued the experience of their clients with "the additional trauma caused by receiving numerous letters (sometimes in excess of sixteen) from attorneys who are aware of that person's arrest and who are soliciting that person's business" (*id.* 334) and recorded their view that the "[g]overnment should not be the partner to this shabby business" (*id.* 361).

Support for CPOA's proposal was far from uniform, however, and various constituencies objected that crime victim and arrestee addresses should not be withheld *entirely*. These concerns led, for example, to amendments relating to the use of address information by licensed investigators. Ct. App. Supp. Excerpt. Rec. 263, 269, 358. Separately, the California Newspapers Association voiced its opposition on the ground that the amendment "would foreclose almost all opportunity of access to important information." *Id.* 329. The California First Amendment Coalition emphatically contended that "surely there is a more carefully tailored remedy," given that:

> With respect to both arrestees and victims, address information is moreover essential if the press is to have any hope of following up – in a timely way – [detecting crime patterns in particular areas], or even getting crime-related information which is increasingly hard to come by from law enforcement agencies directly.
>
> Address specifics are likewise typically the only way that the press can avoid confusing the identities of people with common names in crime reports. . . . While newspapers seldom print exact addresses nowadays, it is not uncommon to localize identities by neighborhood or street ("an Acme Boulevard resident, John A. Jones, was arrested Tuesday in connection with...").

*Id.* 382.



In light of these competing considerations, the Legislature rejected CPOA's proposal that addresses of crime victims and arrestees be withheld entirely. Instead, the state adopted a more tailored amendment. As finally enacted, Section 6254(f)(3) provides that address information will be available "for a scholarly, journalistic, political, or governmental purpose, or . . . for investigation purposes by a licensed private investigator." Furthermore, the requestor must certify that the addresses will "not be used directly or indirectly to sell a product or service."

2. Before the statute's July 1, 1996 effective date, Respondent filed suit in federal district court seeking a declaration that Section 6254(f)(3) violated both the First and Fifteenth Amendments and also an injunction against its enforcement. Ct. App. Rec. 1. Respondent identified itself as "a publishing service that provides, among other information, the names and addresses of recently arrested individuals to its clients," which include "attorneys, insurance companies, drug and alcohol counselors, religious counselors, driving schools, and services such as ignition Breathalyzers." *Id.* 5, ¶ 19. So far as the complaint revealed, Respondent itself used address information to communicate only when it distributed the

"Register," which Respondent described as a publication protected by the First Amendment. *Id.* 8, ¶ 5.[2]

After various pre-trial proceedings, the district court granted Respondent summary judgment on its claim that Section 6254 constituted "an unconstitutional limitation on [Respondent's] commercial speech" and therefore permanently enjoined enforcement of the statute. Pet. App. 12a. The district court acknowledged this Court's repeated admonition that "[t]he First Amendment directly protects the expression of information already obtained; it does not guarantee access to the sources of information" (*id.* 12a-13a), and therefore recognized that "the state could constitutionally prevent everyone from having access to this information" (*id.* 14a.) But the district court nonetheless deemed the statute to "[f]unctionally" constitute "a limitation on commercial speech" because "[t]he government is the only source of this information." *Id.*

The District Court subjected the statute to the full scrutiny applied to commercial speech bans under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Pet. App. 16a. Under *Central Hudson*,

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[2] Although the statute never had gone into effect, Respondent alleged that Section 6254(f)(3) was unconstitutional not only on its face but also as applied. *Id.* 6, ¶ 26. By the time of the district court's decision, the statute had gone into effect and Respondent had refused to provide the required certification that its use of address information, including its publication of the "Register," constituted a "journalistic" or another other permitted purpose. As noted below, the lower courts did not reach Respondent's contention that Section 6254(f)(3) would not permit Respondent to request address information under the statute's journalism provision.



> [1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we mask whether the asserted governmental interest is substantial. [3] If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest, and [4] whether it is more extensive than is necessary to serve that interest.

447 U.S. at 566, *quoted at* Pet. App. 16a.

In evaluating Section 6254(f)(3), the district court did not acknowledge either that the statute permits the release of information for only limited purposes. Instead, the district court proceeded from the premise that Section 6254(f)(3) "prohibit[s] the release of arrestee addresses *only* to people who intend to use those addresses for commercial purposes." *Id.* 11a (emphasis added); *see also, e.g., id.* 14a (Section 6254(f)(3) "makes all arrestee information public, but then limits access only to those who plan to use arrestee addresses in commercial speech"). Analyzing the statute under the first two prongs of the *Central Hudson* test, the district court concluded that Respondent's speech concerned a lawful activity and was not misleading, and furthermore that the state's asserted interest in protecting individual privacy was substantial. *Id.* 17a.[3]

The district court concluded that Section 6254(f)(3) was unconstitutional because the statute failed to "directly advance" the state's asserted interest. In particular, "the

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[3] The district court also recognized that the state's interest in reducing the costs of producing voluminous address reports was substantial but concluded that the statute did not advance that interest because the state must compile the same information for noncommercial users. Pet. App. 18a.

statute still allows [an arrestee's] name and address to be published in newspapers, broadcast on television, and/or obtained by an employer or even an enemy." Pet. App. 21a. The district court also invoked affidavits submitted by Respondent from arrestees "stating that they do not feel that the solicitations invaded their privacy and that they found them helpful." *Id.* As for the privacy interests protected by the statute, the district court concluded that, "If [arrestees] don't like the solicitation, they can simply throw it away." *Id.* Based on the identical rationale, the district court held that "there is not a reasonable fit between the legislature's means and ends." *Id.* 22a.[4]

3. On Petitioner's appeal, the Ninth Circuit affirmed. At the outset, the court of appeals rejected Respondent's suggestion that its sale of address information constituted noncommercial speech entitled to full First Amendment protection: Respondent's "speech can be reduced to, 'I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y price.'" Pet. App. 29a (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976)) (alterations in original). But the Ninth Circuit agreed with the district court that Section 6254(f)(3) failed to directly advance a substantial state interest. In particular, the court of appeals accepted the district court's characterization that under Section 6254(f)(3) "anyone may access the records in question so long as they do not do so with an eye towards using the information for certain types of commercial solicitations." Pet. App. 33a. Based on this premise and relying in part on *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Ninth Circuit held that the statute's exceptions rendered it unconstitutional stating

[4] Given this broad holding that Section 6254(f)(3) was unconstitutional, the district court did not reach Respondent's alternative argument that the statute would prohibit its publication of the "Register" and thereby violate the First Amendment.



that "[i]t is not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses of the same to be published in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes." *Id.*

This Court subsequently granted certiorari.

## SUMMARY OF THE ARGUMENT

Cal. Gov't Code § 6254(f)(3) is a constitutional exercise of the state's right to place conditions upon the release of state resources, including conditions that ensure these resources are not commercially exploited. The provision does not regulate speech or penalize the exercise of free speech rights. United Reporting is free to obtain the identical information from other sources and disseminate it freely.

Section 6254(f)(3) is thus no more than an access restriction, and there is no First Amendment right of access to government-controlled information, let alone the home addresses of arrestees and victims of crimes that are only available because of the state's coercive powers. This Court's precedents are emphatic that the Constitution protects the public's right to know by proscribing restrictions on speech and the press, not by guaranteeing a right of access to government information. If there is any tradition governing the release of government information, it is one that leaves the sensitive questions of which records to release and to whom to the democratic process.

Nor does California's release of the home addresses of arrestees and crime victims for a select number of purposes raise First Amendment concerns or merit heightened scrutiny. Section 6254(f)(3) does not deny access to information to any individual or organization based upon the content of their speech or their viewpoint. Instead, any requester can receive the information for the limited number of purposes that the statute authorizes. The lines drawn by the statute are unrelated to speech and instead primarily relate to the state's

interest in ensuring that the public is kept informed about matters related to arrestees and victims.

Because Section 6254(f)(3) is no more than an exercise of the legislature's power to limit access to its resources for purposes it deems to be in the public interest, only minimal scrutiny applies. To the extent that the statute at all restricts Respondent's ability to use address information for commercial speech (and Respondent's speech interest in this case borders on the ethereal), that restriction is incidental to the State's unquestioned right to control the use of its resources. The state legislature may subsidize those activities that it chooses and has no obligation to allow Respondent to make a profit off of state resources simply because it allows the use of those resources for other limited purposes. Further, even though the provision does not even classify authorized uses on the basis of speech, it is entirely within the state's power to subsidize certain types of speech while refusing to subsidize others. In addition to endangering the state's power to control the use of its resources, applying heightened scrutiny to the classification drawn by the California legislature additionally risks undermining the very values that Respondent claims to champion by giving the State an incentive to withhold information entirely if put to a choice between releasing it for no uses and releasing it for all uses.

Section 6254 is an entirely rational means of advancing the state's interest in balancing the state's interest in an informed citizenry with the right of arrestees and victims to privacy. The provision markedly reduces the total dissemination of private arrestee information and consequently reduces the volume of solicitations of arrestees and victims that occur through the use of state information. Further, the statute prevents employers, banks, credit bureaus, and universities among other institutions from discriminating against arrestees. The state may also properly deem trafficking in private information to be a disfavored business



that the state need not support through its coercive power to compel its citizens to provide private information.

Cal. Gov't Code § 6254(f)(3) also meets the requirements of the *Central Hudson* test for restrictions on commercial speech. The statute directly advances the State's competing interests in protecting the privacy of arrestees and victims while keeping the public informed about matters of public significance. It protects privacy by reducing the dissemination of private arrestee information, reducing the solicitation of arrestees, preventing arrestee information from being used against arrestees, and preventing the commercialization of information that is made available due to the coercive powers of the state. Further, the provision reasonably fits the state's interest in balancing the public's right to know against the individual arrestee's interest in privacy by providing address information only for those purposes that best keep the public informed at the lowest possible cost to privacy.

## ARGUMENT

I. Cal. Gov't Code § 6254(f)(3) is Constitutional Because it Advances the State's Interest in Protecting the Privacy of Arrestees and Victims While Keeping the Public Informed about Matters of Public Significance

A. The Ninth Circuit Erred in Evaluating Cal. Gov't Code § 6254(f)(3) Under the *Central Hudson* Framework Because the Provision is not a Speech Restriction

Section 6254(f)(3) does not restrict commercial speech and therefore is not properly subject to scrutiny under the *Central Hudson* framework. First and foremost, the statute does not restrict speech. It does not regulate speech or deny a benefit to any individual or organization because that organization engages in disfavored speech. Nor does it penalize United Reporting for publishing this information if it obtains it from another source. *Smith v. Daily Mail Publ'g*

*Co.*, 443 U.S. 97 (1979). The statute instead authorizes the release of information to anyone who agrees to use it for one of five prescribed purposes.

As a result, Section 6254(f)(3) prevents most uses of the information and thus does not even single out commercial uses for disfavored treatment. It prohibits acquisition of address information not only for commercial purposes but also for charity. A nonprofit group may not use the information to provide counseling to victims or arrestees, just as an attorney may not solicit clients with it. A religious institution may not obtain the list to provide comfort or to increase its membership. Contrary to the reading of the lower courts, the provision also does not allow general public access to the addresses out of idle curiosity, to determine whether a neighbor has ever been arrested, or to locate someone. Similarly, a newspaper may not use the information to solicit newspaper subscriptions, nor could a licensed private investigator use the information to drum up business.

Section 6254(f)(3) also operates prophylactically to prevent many uses of address information that have nothing to do with speech. For example, the statute prevents employers, from using the information to decide whether to hire or fire an applicant or employee. It also prevents the amateur sleuth from obtaining the information to investigate a crime.

Given that the statute does not regulate speech at all, the statute certainly does not regulate speech on the basis of content or viewpoint. Nor does the statute prohibit certain speakers from speaking on certain subjects. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Nor has the government dedicated a forum for speech in general or speech on a particular subject and then discriminated within that forum on the basis of viewpoint. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). A reporter who wants to use the information to write an article that an arrestee was the victim of police brutality is as free to use arrestee addresses to help write that article as the reporter



who argues that the police showed restraint. A victim's rights group seeking to use address information for the political purpose of inspiring a victim to advocate for greater protection for victim's rights may do so. So too may a defense attorney seeking to enlist an arrestee's help in protesting police brutality.

On the other hand, victim's rights advocates may not obtain victim's addresses simply to provide counseling, just as a criminal defense attorney may not use the information to solicit a client. And no one may exploit the information for a commercial or charitable purpose no matter what the viewpoint or content of the message.[5] Groups ranging from churches to lawyers to insurance companies are prohibited from soliciting using the home addresses of arrestees and victims. The statute is thus wholly unlike the statutes that this Court has previously evaluated under the *Central Hudson* framework, which prohibited certain messages based upon content or viewpoint or involved government-enforced contributions for the dissemination of certain types of messages.[6]

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[5] This Court's decisions evaluating the First Amendment right of attorneys to solicit clients are thus inapposite. *See, e.g., Florida Bar v. Went For It*, 515 U.S. 618 (1995). Most importantly, the regulation of attorney solicitation does not require the same level of justification as the refusal to subsidize attorney solicitation. Further, unlike decisions addressing attorney solicitation and commercial speech generally, the state has not here singled out any particular message or viewpoint for disfavorable treatment. Moreover, the state has not even targeted speech, but instead has merely prevented the use of arrestee addresses for profit among many other uses that the statute does not authorize.

[6] *See Glickman v. Wileman Bros & Elliot, Inc.*, 521 U.S. 457 (1997) (sustaining mandatory assessments on agriculture producers for generic advertising); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (striking down Rhode Island ban on alcohol

To the extent that a speech interest of Respondent's is at stake in this case, it borders on the ethereal. The Ninth Circuit defined Respondent's speech interest as follows: "United Reporting sells arrestee information to clients; nothing more. Its speech can be reduced to, 'I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y

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advertising); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (striking down prohibition on the display of alcohol content on beer labels); *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993) (upholding federal statutes that prohibit publication of lottery by a broadcaster licensed by a state that prohibits lotteries but permit publication by a broadcaster licensed by a state that authorizes lotteries); *Board of Trustees v. Fox*, 492 U.S. 469 (1989) (rejecting "least" restrictive means test for commercial speech and remanding prohibition on commercial enterprises in university facilities that contained many exceptions); *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522, 526 (1987) (upholding statute authorizing United States Olympic Committee "to prohibit certain commercial and promotional uses of the word 'Olympic'"); *Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding statute restricting advertising of casino gambling in Puerto Rico); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (striking down ban on unsolicited ads for contraceptives); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (striking down ban on outdoor advertising billboards); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that the ban on promotional advertising by electric utilities violated the First Amendment); *see also Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977) (striking down ban on "For Sale" and "Sold" signs in township); *Virginia State Bd. Of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748 (1976) (striking down ban on advertisement of prescription drug prices). The Court has also evaluated restrictions on attorney solicitation under the *Central Hudson* test. *See, e.g., Florida Bar v. Went For It*, 515 U.S. 618 (1995) (sustaining Florida Bar's ban on direct mail attorney solicitations of accident victims and relatives for 30 days after the accident); *see also Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down ban on in-person solicitation by CPAs).



price.'" Pet. App. 29a. Even this limited conception overstates Respondent's interest. First, the statute does not prohibit Respondent from stating this message; it simply prohibits Respondent from selling state-collected information and thus only prevents Respondent from making the statement accurate using the state's resources. The provision thus does not prohibit restrictions on truthful speech about lawful products. *Compare, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996). To the contrary, it prohibits all commercial exploitation of this state-collected information.

Second, even if there were an effect on Respondent's "message," that effect is at best indirect. The regulation (1) prohibits United Reporting from gathering information (2) so that it then has the information available to sell to its clients (3) so it can then truthfully tell its clients that it can sell them X information at Y price. As this Court recognized in *Zemel v. Rusk* in upholding a ban on travel to Cuba against a First Amendment challenge:

> [There] are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

381 U.S. 1, 16-17 (1965).

Taking into account the speech interest of Respondent's clients in solicitation of arrestees and victims, which Respondents lack standing to assert, does not change the analysis. Section 6254(f)(3) still simply limits the use of the information. It does not regulate solicitation, does not condition a benefit on anyone's agreement not to solicit so

long as they do not use the information itself to solicit, does not classify authorized uses on the basis of speech, and disallows most uses of the information, including all for-profit and charitable uses. All of United Reporting's clients may continue to solicit arrestees and victims but are no longer entitled to the state's help in finding their prospective clients.

The statute thus effects nothing more than the limited release of the private home addresses of arrestees and victims of crime. As explained in the next section, United Reporting and the public in general have no right to this information under this Court's First Amendment precedents. Accordingly, the state's release of the information for limited purposes while proscribing its use for all other purposes is, as Section C will elaborate, no more than an unproblematic exercise of the California legislature's power to control the use of its resources. To justify such a provision, the State need only demonstrate that the provision is rational, a test that Cal. Gov't Code § 6254(f)(3) easily passes. The Ninth Circuit thus erred in applying the *Central Hudson* framework to this provision.

### B. There is no Constitutional Right of Access to the Home Addresses of Arrestees and Victims

Had the California legislature so desired, it could have eliminated all public access to the addresses of arrestees and victims. Cal. Gov't Code § 6254(f)(3) does not implicate the First Amendment because it simply limits access to information and does not restrict speech. The provision thus fits squarely within this Court's longstanding refusal to recognize a First Amendment right of access to government information. Respondent's claim, if successful, would constitutionalize an area that has historically been the province of the political branches of government.

Restrictions on access to government information do not run afoul of the First Amendment. The Constitution "is neither a Freedom of Information Act nor an Official Secrets



Act." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion). "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Id.* at 15. While the right of the public to know about the affairs of government is an important consideration that underlies the First Amendment, the Constitution accomplishes this goal not by requiring the government to release information in the government's possession but by the indirect means of proscribing government regulation of the speech of its citizens and the press.[7]

> As Justice Stewart explained:
>
> "The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system, on the tug and pull of the political forces in American society."

*Houchins*, 438 U.S. at 14 (quoting Justice Stewart (who also concurred in the judgment in *Houchins*); "Or of the Press," 26 Hastings L.J. 631, 636 (1975)). Thus, while the Constitution requires the scrutiny of regulations which ban or regulate the publication of information in the speaker's possession, *see, e.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (West Virginia law that prohibited publication of the identity of juvenile offenders without prior court approval was an

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[7] *E.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (civil discovery rules facilitating a litigant's ability to obtain information from the other side were "a matter of legislative grace"; thus, "information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in another context")

unconstitutional prior restraint), it does not require the government to disclose government information to the public.

The lone qualification to the state's ability to limit public access to government proceedings is the presumptive right of the public to attend criminal trials.[8] Respondent seizes upon this right to argue for a general right of access to information. *See* Resp. C.A. Br. 19, 21-22. In doing so, Respondent ignores both precedent and the very rationale for the Court's decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). *Richmond Newspapers* held that such trials are presumptively public because of the long tradition of public access to such trials, which predated the First and Fourteenth Amendments. The Court rooted this right in the "unbroken, uncontradicted" history of public trials, which dated back to long before the Constitution and as far back as the Norman Conquest. *Id.* at 565, 573.

The Court further recognized that the "Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open," *id.* at 575, and thus that the "right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press." *Id.* at 577.[9] The Court also recognized the connection between

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[8] *Richmond Newspapers , Inc v. Virginia*, 448 U.S. 555 (1980), and its progeny are the lone cases of this court cited by Respondent for its statement that "The First Amendment and Its California Equivalent Rigorously Protect Access to Information." Resp. C.A. Br. 18. But Respondent ignores the *Houchins* plurality's emphatic rejection of this position as well as the dissent's recognition that the extent of public disclosure of government records is a matter of government policy. *See infra* n.13.

[9] Based on the same rationale, this Court similarly found in *Press-Enterprise Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 508 (1984), that jury selection should be presumptively open based upon the fact that "[p]ublic jury selection . . . was the common practice in



the right of assembly and criminal trials. *Id.* Moreover, the Court expressly distinguished cases that declined to find a similar right of access to prisons because of the lack of a similar historical tradition of openness. *Id.* at 576 n.11.

Suffice it to say that no similar historical pedigree or interest supports a right of access to the home addresses of arrestees and victims. Indeed, this Court has recognized in the context of the Freedom of Information Act that the "'public interest in disclosure is at its nadir' when third parties seek law enforcement records concerning private citizens, given that those records would shed no light on the activities of government agencies or officials." *United States Dep't of Defense v. FLRA*, 510 U.S. 487 (1994) (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989)). Further, statutes granting broad public access to government records are a relatively recent innovation that far postdates the ratification of the Constitution or the Fourteenth Amendment. Indeed, by 1940, only twelve states had open records statutes at all and "[e]ven these were usually only one or two sentences in length and lacked any interpretive definitions or guidelines." Comment, "Public Inspection of State and Municipal Documents: 'Everybody, Practically Everything, Anytime, Except . . . .'", 45 Fordham L. Rev. 1105, 1107 (1977).

Historically, in the vast majority of states, open records law was judicial in origin and had a very limited scope and purpose. *Id.* at 1107, 1108. "The common law rules regarding public inspection of documents developed largely in response to evidentiary requirements of litigants rather than as

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America when the Constitution was adopted," and in *Press-Enterprise Co. v. Superior Ct. of Cal.*, 478 U.S. 1, 10-11 (1986) that preliminary hearings should be similarly accessible given a similar tradition of presumptive accessibility.

a monitoring process of public servants." *Id.* at 1108.[10] Slowly, some courts broadened the "litigation interest" requirement but still required those seeking access to be "acting on behalf of a broader public interest," *id.*, such as, for example, "a citizen's desire to keep a watchful eye on the workings of public agencies" or "a newspaper publisher's intention to publish information concerning the operation of government." *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 598 (1978) (citing cases). At the same time, some states continued to maintain the litigation interest requirement even into the 1970s. *See, e.g., Daluz v. Hawksley*, 351 A.2d 820, 833 (R.I. 1976).

Gradually, the narrow common law of open records gave way to far broader freedom of information statutes, and by 1977, 48 states had such laws. *See* Comment, 45 Fordham L. Rev. at 1106 (collecting statutes). These statutes tend to grant broad rights of access to a wide array of public documents while imposing various restrictions on the use of particular types of records. Commercial purpose restrictions, such as the one at issue in this case, are common. Six states, for example, either have general commercial purpose restrictions in their open records statutes, *see* Ariz. Rev. Stat. § 39-121.03 (1997); N.Y. Pub. Off. Law § 89 (Consol. 1998); R.I. Gen. Laws § 38-2-6 (1997); Wash. Admin. Code § 42.17.1260 (1997), or limit the commercial use of a broad class of public records, *see* Md. Code Ann. § 9-1015 (1997) (vital records) and N.M. Stat.

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[10] The requester would generally be required to establish an interest in the document, "'such as would enable him to maintain or defend an action for which the document or record sought can furnish necessary information.'" *Id.* at 1108 (citing *Fayette Co. v. Martin*, 1130 S.W.2d 838, 843 (Ky. 1939)), a decision that was not overruled until 1974 in *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811 (Ky. 1974)



Ann. § 14-2-A-1 (Michie 1998) (databases of state agencies).[11]

Many other states restrict the use of certain types of records for commercial and other purposes. In all, at least thirty-four states and the District of Columbia prevent the commercial exploitation of at least some government records. For example, an additional nine states whose open records statutes lack general commercial purpose exclusions prohibit the commercial *and* political use of welfare records but allow their use for other purposes. *See, e.g.*, O.C.G.A. § 49-4-14(b) (1997) (Georgia statute stating that no person obtaining public assistance records from the government "shall use such information for commercial or political purposes").

Other states forbid the use of election disclosure reports for commercial purposes or for the purpose of soliciting contributions. *See, e.g.*, Haw. Rev. Stat. § 11-193(a)(4) (1997) (stating that "no information or copies from the reports shall be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose"). Other states, like California, enumerate authorized uses of information and exclude all others. Florida, for example, while specifically prohibiting the use of voter registration information for commercial purposes, forbids the use of a list of registered voters for any use *other than* any "related to elections, political or governmental activities, voter registration, or law enforcement." Fla. Stat. § 98.095(2) (1997). State statutes also limit, for example, the commercial use of state motor vehicle registration information, *e.g.*, Ark. Code Ann. § 27-14-412 (Michie 1997); accident reports, *e.g.*,

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[11] See Pet. 1a-6a for a complete list of state statutes with commercial purpose exclusions. In that appendix, Ky. Rev. Stat. Ann. § 61.870 was inadvertently included in category B (General Public Records Statutes), and S.C. Code Ann. § 30-4-50 should have been included in category F (Miscellaneous Statutes).

Ariz. Rev. Stat. § 28-667 (1998); traffic citations, *e.g.*, Fla. Stat. § 316.650 (1998); information on gross receipts provided in applications for business licenses, S.C. Code Ann. § 30-4-40 (Law Co-op. 1997); public records including the personal information of the handicapped for solicitation solely on the basis of the handicap, *id.*; and information contained in a police incident report as well as the names and addresses of employees and officers revealed in response to a freedom of information request, S.C. Code Ann. § 30-4-50(B) (Law Co-op. 1997).

Analogous federal laws and regulations restrict the use of certain types of records. Indeed, this Court until recently prohibited the use of tapes of its proceedings for commercial purposes.[12] For example, federal law permits public access to reports and statements that must be filed with the FEC, but prohibits any information obtained from these records to be used for commercial purposes. 2 U.S.C. § 438 (1998). Similarly, reports filed pursuant to the Ethics in Government Act may not be used for commercial purposes "other than by news and communications media for dissemination to the general public." 5 U.S.C. § 105(c)(1)(B) (1998). Further, Congress has specifically legislated that states will not be deprived of any grants to which they are entitled under the Social Security Act for granting public access to state disbursement records, so long as the states prohibit the use of the names of payment recipients for commercial or political purposes. 42 U.S.C. § 1306a (1998).

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[12] "For almost 25 years, the oral argument tapes, made by court personnel, were available only to federal employees in connection with their official duties or to people doing 'scholarly or legal research.' Copying of the tapes was limited, and the tapes could not be used for commercial purposes." Joan Biskupic, "Court Makes Tapes of Arguments Available; Easing of Restrictions Follows Dispute over Professor's Sale of Sets," Washington Post, November 2, 1993, at A4.



In addition to restricting access to different types of records for different purposes, states have also adopted various procedures for preventing the unauthorized use of public records. Section 6254(f)(3), for example, penalizes the securing of the information under false pretenses. Other states penalize the actual use of the information for unauthorized purposes. Indiana, for example, penalizes the use of a welfare list for commercial purposes as a Class B misdemeanor. Ind. Code Ann. § 12-14-22-8 (Michie 1998). Georgia punishes the government employee who discloses the information "when the employee knows or reasonably should know that the request for access to the [accident report] is for an unauthorized purpose." O.C.G.A. § 33-24-53(c) (1998).

Thus, if there is a tradition that governs open records laws, it is one of evolution and experimentation governed by a variety of approaches to the myriad issues posed by public access to government records. Driven by democracy, this tradition of openness has resulted in broad public access to public records with exceptions enacted by state legislatures to protect other interests. Respondent would cut a broad swath through this exemplar of responsible self-governance and render it a mere supplement to the Constitution. Every complaint that an information restriction violates the Freedom of Information Act or analogous state law would now contain an additional count entitled "First Amendment," and *United Reporting* litigation would become a subspecialty in the law.[13]

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[13] *United Reporting* litigation is proceeding apace in California. Since the Ninth Circuit's decision, two commercial information providers, one represented by Respondent's counsel, have filed lawsuits challenging two separate provisions of the California code. In *Health Information Association v. Younkin*, No. 99-CV-0046-TW, plaintiff challenges Cal. Lab. Code § 138.7 (b)(5) (Deering 1997), which provides that the addresses of those filing workers' compensation claims may only be released to specified governmental entities or "for journalistic purposes." In *IRSC v. Jones*, No. SACV98-1112LHM, the plaintiff challenges Cal. Gov't

In addition to the lack of a constitutional basis for a general duty to disclose government information, let alone the home addresses of victims and arrestees, the countless difficulties endemic in defining such a right counsel against its recognition. Indeed,

> There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would, under the Court of Appeals' approach, be at large to fashion ad hoc standards, in individual cases, according to their own idea of what seems 'desirable' or 'expedient.'

*Houchins*, 438 U.S. at 14.[14] As a consequence, this Court has long held that it is up to the political branches to weigh the

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Code § 6254.4 (Deering 1997) and Cal. Elec. Code §§ 2194(a)(2) (Deering 1997), 18109 (Deering 1997) , which provide that voter registration lists may only be released to candidates, political committees, or for "election, scholarly, journalistic, political, or governmental purposes."

[14] While the Court was divided on the prison regulation in *Houchins*, it was unanimous on the point that the Constitution does not afford a general right of access to government records. The dissent in *Houchins* agreed that the extent of public disclosure of government records should generally be left to the political process and noted that the question of whether the prison's policies, "which cut off the flow of information at its source," violated the public's right to know "does not depend upon the degree of public disclosure which should attend the operation of most government activity. Such matters involve questions of policy which generally must be resolved by the political branches of government." *Id.* at 34 (Stevens, J., dissenting). The dissent went on to observe that prison conditions are "wholly without claim to confidentiality," which is not true of the home addresses of arrestees and crime victims. *Id.* at 36. Further, Section 6254(f)(3) would only "cut off the information



state's interest in an informed citizenry against the need to prevent the dissemination of private information revealed in judicial proceedings. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) ("If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. *Their political institutions* must weigh the interests in privacy with the interests of the public to know and of the press to publish" (emphasis added)). A restriction on access to the home addresses of arrestees and victims of crime provides no basis for deviating from this traditional course and thereby constitutionalizing an area of law that in the past has properly been left to the considered judgment of state courts and legislatures.

### C. Because Cal. Gov't Code § 6254(f)(3) is an Access Restriction that Allows the Release of Information Only for Specified Purposes, Only Rational Basis Scrutiny Applies.

Because the First Amendment grants no right of access to the addresses of arrestees and victims, the lone remaining question is whether the release of the information for certain authorized purposes implicates the First Amendment. It does not. The state is under no obligation to allow the for-profit use of the private information of its citizens.[15] Thus, even though the state did not do so in this case, it would have been entirely constitutional for the California legislature to prevent

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at its source" if it prohibited arrestees from disclosing their own addresses.

[15] Because this case implicates no more than United Reporting's right to sell state-collected private information, it does not present the question of what standard of scrutiny applies to an attempt by the government to regulate the sale of information that is not provided by the state.

all use of the information for a commercial purpose or to prevent its use for commercial solicitation alone.

Any other conclusion would implicate the First Amendment in every corporate subsidy and in every advantage that the government provides to nonprofit organizations over businesses that could help a business to speak. That result is irrational and conflicts with precedent. In *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985), for example, this Court held that a government charity fundraising drive aimed at federal employees could exclude nonprofit groups that seek to influence elections or public policy through political activity, lobbying, or litigation was reasonable and, therefore, constitutional so long as the restriction was not a pretext for viewpoint discrimination against the plaintiff. Respondent's position would not only mean that *Cornelius* was wrongly decided, but that heightened scrutiny would have applied to the government's decision to exclude for-profit solicitation from the charity drive.

Instead, as *Cornelius* reflects, the law is clear that the government may selectively support speech-related activity so long as it does not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas." *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (citations and internal quotations omitted). In TWR the Court upheld a provision of the tax code that denied a nonprofit organization the right to receive tax deductible contributions to support its efforts to influence legislation. The Court reasoned that the government is not obligated to subsidize lobbying simply because it subsidizes other activities:

> [T]he Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying



> out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.

*Id.* at 545.

Similarly, nothing prevents United Reporting from selling or publishing the names of arrestees if they obtain the information from another source, and United Reporting, just like any other organization, may obtain the information if it intends to use it for proper purposes. The California legislature has simply elected not to aid Respondent in its commercial enterprise even as the State has done nothing to penalize or prohibit those activities. The fact that Respondent only wants to use state-collected information for commercial purposes is of no more consequence than TWR's desire to use tax deductible contributions for lobbying. *See also FCC v. League of Women Voters*, 468 U.S. 364, 386 (1984 (recognizing that government could properly prohibit state resources to be used for editorializing even as it subsidized noneditorial speech)[16]; *Cammarano v. United States*, 358 U.S.

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[16] The Court struck down the restriction in *League of Women Voters* because it determined that the restriction on editorializing would deter a public broadcasting station from engaging in the prohibited speech at all rather than simply preventing the use of the subsidy for editorializing. As the Court stated in *Rust v. Sullivan*, 500 U.S. 173, 197 (1991), "'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct." While this line can sometimes be difficult to draw in cases that involve financial subsidies because of the fungibility of money, the line between a penalty and subsidy is clear in the case of information. Unlike money, information does not "free up" other information for unauthorized uses. Either the organization uses information for the prohibited purposes, or it does not. By

498 (1959) (upholding regulation denying business expense deduction for lobbying or any non-trade related advertising even on those issues that affected petitioner's business).

The Court has even made clear that the legislature may subsidize certain viewpoints without funding other viewpoints that are specifically excluded from the project funded. Thus, the Court in *Rust v. Sullivan*, 500 U.S. 173, 179 (1991), upheld regulations which prohibited projects that received Title X funds from providing "counseling concerning the use of abortion as a method of family planning or . . . referral for abortion as a method of family planning." The Court recognized that when "Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." *Id.* at 194. Just as in the present case, the regulations in *Rust* did "not force the . . . grantee to give up abortion-related speech; they merely require[d] that the grantee keep such activities separate and distinct from Title X activities." *Id.* at 196. In other words, the government was wholly justified in ensuring that its funds did not go to subsidize a viewpoint with which it disagreed even as it funded related speech. This is not "the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194

If anything, Cal. Gov't Code § 6254(f)(3) stands on even firmer constitutional ground than *Cornelius* and the subsidy trilogy described above because it does not classify the uses which may be made of its resources on the basis of speech.

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accepting the information for authorized uses, the organization need not relinquish other speech-related activity but simply must agree not to use the information secured from the government for that purpose.



Instead, it authorizes certain uses of the information and prevents all other uses, including *all* for-profit uses, many of which, as discussed above, do not even involve speech and others of which bear only a tenuous relationship to speech. In the subsidy cases, by contrast, the challenged conditions prevented the funds from being used for particular types of speech that are the very cornerstone of the First Amendment (*i.e.*, political advocacy, lobbying, editorializing, and speech expressing a particular point of view) while permitting it for other purposes, yet the Court nonetheless upheld the right of the government to control the use of its resources.

This case therefore does not test the limits of the principles articulated in *Rust* because it in no way discriminates on the basis of viewpoint.[17] The government, instead of withholding this information altogether, has simply released it for governmental purposes and purposes that are related to the goal of keeping the public informed about governmental activities.[18] Even viewing the statute as a

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[17] *Cf. Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (law that regulated hate-crimes based on speaker's motive rather than the expressive nature of the act does not implicate First Amendment). This case does not present the difficult question discussed by the Court in *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998), regarding the extent to which the state may choose to fund certain viewpoints. This subsidy has hardly been "'manipulated' to have [the] 'coercive effect'" of driving certain viewpoints from the marketplace. *Id.* at 2178. *Cf. id.* at 2184 (Scalia, J., concurring in the judgment) (arguing that the selective funding of particular viewpoints has nothing "to do with abridging anyone's speech.").

[18] Petitioner has no doubt that some of the services provided by the clients of United Reporting will in many cases help arrestees and victims. But the state has not chosen to release this information for all purposes that have the potential of helping arrestees and victims and then excluded commercial speech. Instead, it has released the information for the purpose of keeping the public

proscription on commercial solicitation alone - an erroneous characterization as described above - the statute is an entirely unproblematic exercise of the state's power to fund types of speech. Refusing to support the sale of information or commercial solicitation is no more viewpoint-based than a refusal to fund lobbying, editorializing, or political advocacy.

Accordingly, Respondent is simply wrong when it states that "arrestee addresses must be either public and available to *all* as mandated by the Act, or expressly exempted from public access because of a more compelling state interest." Resp. C.A. Br. 21. Respondent's position would impose heightened scrutiny upon every off-the-record briefing and every leak. This position would remove the flexibility that is necessary for state legislatures to craft the delicate balance between the public's right to know and, in this case, the right of arrestees and victims to privacy. California need not subsidize United Reporting's commercial enterprise to enable journalists or scholars to interview arrestees. Selective support that favors particular purposes or uses over others does not implicate the First Amendment.

### D. The Release of Information Solely for the Particular Purposes Enumerated in Cal. Gov't Code § 6254(f)(3) Bears a Rational Relationship to the State's Legitimate Interest in Balancing the Privacy of Arrestees and Victims with the Public's Right to Know.

As Section I of this brief demonstrates, the classification drawn by Cal. Gov't Code § 6254(f)(3) does not merit heightened scrutiny because (1) the government has the right to restrict access to information without implicating the First Amendment, (2) the government may selectively release information for particular purposes and ensure that the

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informed, a purpose to which the use of the information for commercial purposes is unrelated.



information is used for that purpose, and (3) the statute is not a speech classification at all and does not discriminate on the basis of content or viewpoint. "Such a statute cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate government purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Under this test a classification "'must be upheld against Equal Protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (quoting *FCC v. Beach Comm., Inc.*, 508 U.S. 307, 313 (1993).

A brief summary of the state's interests will demonstrate the rationality of Cal. Gov't Code § 6254(f)(3). As an initial matter, the provision advances the state's interest in protecting the privacy of arrestees and victims by eliminating the greatest potential for the dissemination of their home addresses. United Reporting and similar commercial reporting services distribute the addresses in bulk to their clients and advertise their ability to do so. Further, as discussed further in section II, the inevitable result of allowing commercial use of this information will be its total public disclosure. The state legislature may rationally have determined that Section 6254(f)(3) will not result in this level of disclosure because newspapers and academics tend to use addresses to interview arrestees and victims about matters of public significance, rather than to disseminate the information further. *See Beach Comm.*, 508 U.S. at 320 (so long as the factual assumptions underlying a classification are arguable, the statute is unconstitutional) (citing *Vance v. Bradley*, 440 U.S. 93, 112 (1979).

Further, by markedly reducing the dissemination of arrestee addresses, the statute also reduces the level of solicitation of arrestees and victims based on their status, as well the sense of personal violation at the knowledge that their address and status as an arrestee or victim is on numerous commercial mailing lists. The statute also, by preventing all

commercial use of the information, prevents employers and other commercial entities from using an arrestee's status against the arrestee and thereby serves the state's interest in protecting those who have not been convicted of a crime from discrimination.

Recognizing that many find the commoditization of private information to be a troubling societal trend, the state may also decide that it is improper to support a commercial enterprise that traffics in the personal information of California's citizens. Finally, the provision serves the dual interest of protecting the privacy of arrestees and keeping the public informed about matters of public significance by releasing the information for limited purposes. Respondent's position would force the state to choose between the two when the state has struck an entirely reasonable balance by releasing information for the purpose of ensuring that the public is kept informed while preventing the uses that will have the greatest negative impact on privacy.

## II Cal. Gov't Code § 6254(f)(3) Satisfies the Requirements of *Central Hudson*.

Under the test for evaluating commercial speech restrictions, the government must show that the challenged provision directly advances a substantial government interest and is no more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566. Even assuming it is applicable, an analysis under the *Central Hudson* test in this case must take into account several factors that counsel deference to the classification the state has drawn. First, unlike the paradigmatic speech case, the state in this case has not prohibited "the dissemination of truthful, nonmisleading commercial messages." *44 Liquormart, Inc.*, 517 U.S. 484, 501 (1996), but instead has only limited the release of state-held information. United Reporting is free to disseminate its "message" but simply cannot require the state to facilitate its efforts. Second, Section 6254(f) does not regulate commercial



speech or any other kinds of speech but rather simply prevents the acquisition of addresses from the state for commercial use as well as a wide number of other uses.

Third, the state has the power to withhold completely this information from the public domain. Requiring the state to allow commercial uses of information when it releases the information for some other purpose could force the State into withholding the information altogether. Finally and relatedly, any application of the *Central Hudson* test must take into account the state's dual interests in protecting the privacy of arrestees and keeping the public informed. The conflicting nature of these interests and the consequent difficulties in balancing them counsel increased deference to state legislatures engaged in this sensitive analysis.

### A. Cal. Gov't Code § 6254(f)(3) Directly Advances the State's Substantial Interest in Protecting the Privacy of Arrestees and Preventing State-Collected Resources From Being While Keeping the Public Informed about Matters of Public Significance

There is little question that protecting the privacy of arrestees while keeping the public informed are both substantial government interests.[19] Further, California also has an interest in preventing commercial interests from discriminating against them on the basis of their arrestee status. Finally, in addition to protecting arrestees against discrimination, the state has a substantial interest in removing its own contribution to that enterprise, particularly when the

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[19] Both the Ninth Circuit and the District Court in this case found that the interest in protecting the privacy of arrestees was substantial. *United Reporting Publ'g Corp.v. California Highway Patrol*, 146 F.3d 1133, 1135 (9th Cir. 1998) (citing *United Reporting Publishing Corp. v. Lungren*, 946 F. Supp. 822, 829 (S.D. Cal. 1996)).

state's coercive powers are providing a unique contribution to the industry by giving it access to information to which it would not otherwise have access.

Section 6254(f)(3) directly advances all of these interests. As an initial matter, Section 6254(f)(3) directly advances the state's interest in keeping the public informed about criminal justice issues. The goal of scholars and journalists is to keep the public informed and to contribute to the expansion of society's knowledge about matters of public significance. The addresses of arrestees, for example, enable journalists to interview arrestees about newsworthy crimes and about the treatment of arrestees by the State. Further, as a letter from the California First Amendment Coalition to the sponsor of the legislation stated, "address specifics are likewise typically the only way that the press can avoid confusing the identities of people with common names in crime reports." Ct. App. Supp. Excerpt. Rec. 382. Academics will be able to use the addresses to gather data for articles on similar subjects.

Cal. Gov't Code § 6254(f)(3) directly advances the privacy of arrestees and victims in several ways. First, the statute minimizes privacy invasions by preventing those uses of addresses that will result in the information's widest dissemination. The Ninth Circuit's contrary view ignores actual experience that suggests that journalists and academics, generally, do not print addresses and instead use addresses to locate people to interview or to gather data.[20] *Id.* (noting that

[20] Respondent stated in its brief below that "[u]nder section 6254(f)(3), the media may obtain and publish the names and addresses of arrestees, and may do so to increase sales." Resp. C.A. Br. 42. The hypothetical tone of the sentence is telling because the record contains evidence of only one newspaper in California that prints the addresses of arrestees and even that newspaper apparently limits its disclosures to serious crimes. Ct. App. Supp. Excerpt. Rec. 496-547. United Reporting itself states in its "Register" only that, "[n]ewspapers use these records for seed material for feature articles." Ct. App. Supp. Excerpt. Rec. at 11.



"newspapers seldom print exact addresses nowadays") Respondent similarly has never denied that political activists do not seek to disseminate the addresses of arrestees and victims.

Further, allowing the commercial use of arrestee addresses creates an "all or nothing" proposition that is entirely inconsistent with this Court's longstanding deference to states' public records laws. If this Court were to rule that the state has no basis for denying access to the information for a commercial purpose, the state will have even less justification for denying a general right of public access. After all, once it becomes possible to pay United Reporting for the information that the government provides United Reporting for free, no conceivable rationale could justify the continued denial of access to the public at large. Therefore, requiring the use of the information for commercial purposes effectively means that the state may not bar any uses of the information. The state need not have to choose between not releasing the information at all and releasing it for all purposes. Such a conclusion could very well deter California completely from releasing the information.

Indeed, if newspapers made the addresses of arrestees as widely available as the Ninth Circuit's opinion erroneously assumes, then United Reporting would only need newspaper subscriptions to obtain the information that it demands from the state. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. at 764 ("[I]f the [criminal history] summaries were 'freely available' there would be no reason to invoke the FOIA to obtain access to the information they contain"). This very lawsuit testifies to the fact that limiting the disclosure of arrestee addresses to journalistic uses does not result in their widespread availability. Even assuming that some local California newspapers print the addresses of arrestees, the state has an interest in reducing the dissemination of personal information of arrestees and victims whose addresses will not appear in

newspapers.[21] The question of whether the provision directly advances the State's interest in protecting the privacy of arrestees "cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity. Even if there were no advancement as applied in that manner . . . there would remain the matter of the regulation's general application to others." *Edge Broad. Co.*, 509 U.S. at 427.[22]

In contrast to the use that most if not all newspapers and academics will make of addresses, the dissemination of information is the modus operandi of United Reporting and similar organizations. Their profits rise in direct proportion to the number of organizations to whom they can sell the data, and thus, they obtain and distribute this data in bulk to as many customers as they can.

Third, the state has an interest in protecting arrestees and victims from unwanted solicitations. While a visit from a reporter can arguably be as intrusive as an attorney solicitation, reporter visits are likely to occur far less often than commercial solicitations. The countless numbers of arrestees and victims who will never see a reporter of an

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[21] While petitioner would disfavor a practice by newspapers of printing the addresses of arrestees *en masse*, regulating such a practice would require the state to interfere directly with the editorial discretion of newspapers, a cure that the state may deem to be worse than the disease. In any event, experience suggests that newspapers do not generally print addresses and that the occasional newspaper that does print addresses will exercise editorial discretion and not print the address of every arrestee and victim.

[22] Further, an "individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *United States Dep't of Defense v. Federal Lab. Relations Auth.*, 510 U.S. at 500 (holding that the Privacy Act forbids disclosure of union members' addresses to labor unions).



academic because their case is not newsworthy enough, will still receive commercial solicitations from organizations who obtained their addresses from United Reporting. Thus, in addition to resulting in far wider dissemination and in addition to the intrusiveness of the actual solicitation, the commercial use of information will directly confront the arrestee with the knowledge of the extent of the invasion of privacy. The arrestee will know that any commercial entity who is willing to pay for the information (1) knows the status of the arrestee and (2) knows where he or she lives.

The district court and the Ninth Circuit, while correctly recognizing that the privacy of arrestees is invaded "by the solicitor's discovery of the information that led to the solicitation," Pet App. 33a, severely underestimated the effect of the solicitation itself by simply asserting that the party receiving the solicitation can simply throw it away. In addition to the invasion caused by an unwanted solicitation, the solicitation brings home both literally and figuratively the fact that an arrestee's status is subject to widespread dissemination. The annoyance at a commercial solicitation that results from, for example, the widespread distribution of one's magazine preferences is quickly transformed into a true sense of violation at the knowledge that others know that one has been arrested and that the government is responsible for the invasion of privacy. The fact that the state allows reporter interviews of arrestees to keep the public informed about matters of public significance in no way undermines the state's interest in protecting the privacy of arrestees who will never be contacted by a reporter or academic. And the arrestee or victim who is contacted by a reporter or academic can at least take comfort that the information has not been made available to everyone willing to pay for it.

The state could thus conclude that the withholding of arrestee addresses for most purposes will advance the state's twin goals of reducing the dissemination of private information and the individual's subsequent confrontation

with the extensiveness of that violation. Thus, in a variety of ways, the invasion of privacy resulting from disclosure for commercial purposes and, inevitably if Respondent's position is adopted, the public at large is both qualitatively and quantitatively different from the invasion that results from disclosure for the few purposes enumerated in Section 6254(f)(3).

Fourth, the statute prevents employers and other commercial entities from obtaining the arrest records of employees and using it to their disadvantage. Protecting arrestees, particularly those who have not yet been convicted, from discrimination is clearly a legitimate state interest, one that California has asserted in Cal. Lab. Code § 432.7(a) (Deering 1997), which states that "[n]o employer . . . shall ask an applicant for employment to disclose . . . information concerning an arrest or detention that did not result in conviction." Cal. Gov't Code § 6254(f)(3) prevents employers from obtaining information about prospective employees that they cannot obtain by asking them directly, and United Reporting will not be able to obtain the information, sell it, and thereby profit off of its potentially improper exploitation. The provision also will prevent landlords, credit reporting agencies, and any number of commercial interests from discriminating against arrestees. This interest alone is thus more than enough to satisfy both rational basis scrutiny and the *Central Hudson* test.

The Ninth Circuit's reliance on this Court's opinion in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), was thus misplaced. In *Coors Brewing*, this Court found that the "unique and puzzling regulatory framework ensure[d] that" a prohibition on the display of alcohol content on beer labels would "fail to achieve [the] end" of preventing strength wars and therefore did not directly advance the state's interest. *Id.* at 489. The framework allowed disclosure of alcohol content on wine and spirits and also allowed brewers to indicate high alcohol content with the of descriptive terms such as "malt



liquor." *Id.* Such "exceptions and regulations," this Court found "would have counteracted any effect the labeling ban had exerted." *Id.* at 489-90.

The most obvious difference between *Coors Brewing* and the present case is that Cal. Gov't Code § 6254(f)(3) is merely a restriction on access to information and not a regulation of speech. Moreover, as described above, it is a matter of common sense that refusing to allow the commercial use of arrestee addresses will reduce the dissemination of that information and thereby reduce the scope of the invasion of the arrestee's privacy. The occasional publication of addresses of some arrestees or victims does not in any way undermine the state's interest in protecting the privacy of those whose addresses are not published and who are not contacted. Further, the state has, as discussed below, the additional interest of protecting arrestees from discrimination and ensuring that the state has not made a direct contribution to a commercial enterprise that traffics in the personal information of California's citizens.

Finally, as discussed in the next section, there was no suggestion in *Coors Brewing* of a countervailing state interest that justified, for example, the exemption from the labeling ban for alcohol and spirits. In this case the limited exceptions directly serve the state's interest in keeping the public informed about matters of public significance.

### B. There is a Reasonable Fit Between Section 6254(f)(3) and the Competing Goals the Statute Furthers

Under the fourth prong of *Central Hudson*, "there must be a fit between the legislature's goal and method, 'a fit that is not necessarily perfect but reasonable; that represents not necessarily the best single disposition but one whose scope is in proportion to the interest served.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (quoting *Board of Trustees v. Fox*, 497 U.S. 469, 480(1989)). In this case there

is a reasonable fit between the classification that the statute has drawn and the legislature's goal of limiting the invasion of the privacy of arrestees while keeping the public informed. In fact, this Court has long encouraged state governments to "establish and enforce procedures" governing the release of "sensitive information [in their] custody, as a less drastic means than punishing truthful publication [to] guard[] against the dissemination of private facts." *Florida Star v. BJF*, 491 U.S. 524, 534 (1989). As this Court stated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975), "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their *political institutions* must weigh the interests in privacy with the interests of the public to know and the press to publish." (Emphasis added).

Indeed, there is no other way that California could have better balanced both goals. Section 6254(f)(3) releases information for purposes that are most closely linked to the First Amendment's goal of keeping the public informed about matters of public significance while at the same time withholding information for purposes that will have the greatest impact on the privacy of arrestees and victims. As this Court held in *Edge Broadcasting*, 509 U.S. at 430-31, the First Amendment allows legislatures to make such tradeoffs to serve competing goals. To conclude otherwise would force the state to thwart one interest in favor of the other, a conclusion that the First Amendment does not require, particularly when one of the choices would undermine a central First Amendment value such as disclosures to the press.

Even if the commercial use of the information had less net impact on privacy than authorized uses (which as explained above, it clearly does not), the state could conclude that those uses better serve the state's interest in keeping the public informed about matters of public significance. So long



as withholding the information for commercial and other uses advances the state's interest in protecting the privacy of arrestees, *see City of Cincinnati v. Discovery Network*, 507 U.S. 410, 418 (1993), the statute may prevent those uses while authorizing uses that are calculated to keeping the public informed or advancing society's knowledge about crime and the treatment of arrestees.[23] The fact that commercial uses have a far greater impact on privacy only makes the constitutionality of this provision even more clear.

A rule that required the state to distribute private information for every purpose if it distributed it for any purpose would thwart the legislature's ability to attempt to serve both interests simultaneously. By forcing the legislature to make an all-or-nothing choice, the legislature could very well simply decide to withhold the information entirely because of its concern for the privacy of arrestees.[24]

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[23] In the current case, the prohibition on all unauthorized uses will eliminate the greatest potential for widespread dissemination of arrestee information, whereas allowing those uses would do little to advance the state's goal of keeping the public informed. In *City of Cincinnati v. Discovery Network*, 507 U.S. 410, (1993), by contrast, the state's interest in preventing visual blight, which supposedly justified the state's ban on commercial newsracks on public property, was thoroughly undermined by allowing the use of newsracks on public property for all other speech. The statute resulted in the removal of only 62 newsracks while 1,500-2,000 still remained and thus had only a "minimal impact" upon the overall number of newsracks on the city's sidewalks. *Discovery Network*, 507 U.S. at 418. Further, the public's interest in allowing newsracks on public property was no more than the creation of a forum for speech in general.

[24] The interest in preventing the dilution of core First Amendment interests which has provided support for the distinction that this Court has drawn between commercial and noncommercial speech, is at its most convincing in access to information cases. *See Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447 (1978) ("To require a

Respondent's position thus risks undermining the very values that it claims to champion. In this case, the California legislature has struck a sensible balance between these two competing goals by withholding information for those uses that would result in the widest dissemination and allowing the release for those uses that will result in less dissemination while keeping the public informed about matters of public significance.

Under Respondent's position, a state legislature that wants to release information to the public must determine whether it wants to subsidize the commercial traffic of that information at the same time. In addition to the serious privacy implications of such a decision, the public, through its elected representatives, may simply feel it is unseemly for the state to coerce individuals into providing private information to the government and then releasing it for the benefit of commercial interests. Indeed, one of the ominous trends of the information age is the commoditization of private information and its resultant widespread dissemination.

The public may make a conscious decision in the information age, that while it will not regulate the traffic of information obtained from other sources, it will not affirmatively help those enterprises to distribute private information that the state must collect for other purposes. The California legislature could not have selected any other method of preventing the coercive apparatus of the state from being used to subsidize the trafficking in private information or to prevent such information from being used against arrestees. This fit alone justifies the classification California has drawn in Cal. Gov't Code § 6254(f)(3)

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parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.")



## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit in this case be reversed.

Respectfully submitted,

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April 30, 1999

**Cal. Gov. Code § 6254**

Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

* * * *

(f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes, except that state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (c) of Section 13960, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of

the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflect the analysis or conclusions of the investigating officer.

Other provisions of this subdivision notwithstanding, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the



factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be withheld at the victim' s request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

(3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code, except that the address of the victim of any crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code shall remain confidential. Address information

obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.